(Slip Opinion)

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
Swing-A-Way Manufacturing Co.	)	EPCRA Appeal No. 94-1
Docket No. EPCRA VII-910-T-650E	)	

[Decided March 9, 1995]

FINAL ORDER

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

SWING-A-WAY MANUFACTURING CO.

EPCRA Appeal No. 94-1

FINAL ORDER

Decided March 9, 1995

Syllabus

U.S. EPA Region VII filed a complaint against Swing-A-Way Manufacturing Co. ("Respondent"), alleging that it had violated Section 313 of the Emergency Planning and Community Right-to-Know Act ("EPCRA"), 42 U.S.C. § 11023, by failing to file a toxic release inventory ("TRI") report for nickel for 1989 and by failing to file TRI reports for sulfuric acid for 1987, 1988 and 1989.

The Presiding Officer held that Respondent had violated EPCRA as alleged and assessed a civil penalty of $12,000 for the nickel reporting violation and $12,000 each for the three sulfuric acid reporting violations (totalling $48,000). On appeal, the Respondent challenges the liability determination with respect to nickel. The Respondent argues that the Presiding Officer erred when she found that Respondent had processed nickel in excess of the 25,000 pound threshold quantity that triggered the need for a TRI report.

Held: The Initial Decision is affirmed.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Firestone:

The Swing-A-Way Manufacturing Co. of St. Louis, Missouri ("Respondent") has appealed an Initial Decision assessing a civil penalty of $12,000 for its failure to file a timely Toxic Release Inventory ("TRI") report for nickel for calendar year 1989, in violation of Section 313 of the Emergency Planning and Community Right-to-Know Act ("EPCRA"), 42 U.S.C. § 11023. [1] Respondent acknowledges that it did not file a TRI report for nickel for 1989, but argues that it did not process a reportable quantity of nickel during that year, and therefore was not required to file the report. The Region has filed a motion to dismiss the appeal on the ground that Respondent did not comply with all of the Agency's procedural rules for filing an appeal. [2] The Region has also filed a Reply Brief in which it argues that the Initial Decision should be affirmed because Respondent has not demonstrated that the Presiding Officer erred in her determination that Respondent had processed a quantity of nickel in 1989 that

[1] Section 313(a) requires facilities subject to its requirements to complete a chemical release form, which in turn may be made available to the public as part of a Toxics Release Inventory. *See* Sections 313(g) and (h), 42 U.S.C. §§ 11023(g) and (h). Throughout this proceeding the Region has referred to the 313(a) reporting obligation as the obligation to file a TRI report, and while the report is actually known as "Form R" we will use the Region's characterization in this decision.

[2] Respondent is represented in this appeal by its process supervisor, Mr. Gerry Vogelpohl, who was also its sole witness at the hearing. Mr. Vogelpohl came to work for Respondent after the violations occurred.

exceeds the statutory threshold. For the reasons stated below, the Initial Decision is affirmed. [3]

I. *BACKGROUND*

A. *Statutory Background*

EPCRA § 313(a), 42 U.S.C. § 11023(a), requires owners and operators of facilities that are subject to its requirements to submit an annual TRI report for each listed toxic chemical that the facility "manufactured, processed or otherwise used" during the preceding calendar year in a quantity that exceeded the threshold quantity specified in the statute. [4] The statute specifies a threshold quantity of 25,000 pounds for reporting all listed chemicals (including nickel) manufactured or processed in 1989. *See* 42 U.S.C. § 11023(f)(B)(iii). *See also* 40 C.F.R. § 372.25(a). Any person who fails to file a report under § 313 may be assessed a civil penalty of up to $25,000 for each such reporting violation pursuant to EPCRA § 325(c), 42 U.S.C. § 11045(c).

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[3] The Presiding Officer also assessed civil penalties of $12,000 each for Respondent's failure to file TRI reports for sulfuric acid for 1987, 1988, and 1989. Respondent has not appealed from this $36,000 penalty assessment.

[4] The term "process" is defined to mean:

> [T]he preparation of a toxic chemical, after its manufacture, for distribution in commerce --
>
> (1) in this same form or physical state as, or in a different form or physical state from, that in which it was received by the person so preparing such chemical, or
>
> (ii) as part of an article containing the toxic chemical.

42 U.S.C. § 11023(b)(1)(C)(ii). The reporting requirement is implemented in regulations at 40 C.F.R. Part 372 Subpart B.

B. *Factual Background*

Respondent manufactures manual can openers and ice crushers at its facility in St. Louis, Missouri. During the manufacturing process, the steel product parts are placed on a rack which is immersed in a nickel-plating bath before the parts are assembled into finished products. After the product parts are removed from the bath, Respondent sends the nickel-contaminated rack stripping solution and the spent nickel plating bath solution to CG Inorganics in Illinois, which recovers the nickel from the solutions.

Region VII conducted a routine inspection of Respondent's facility on June 18, 1991, to determine whether Respondent was in compliance with EPCRA § 313. During the inspection, the inspector obtained invoices indicating that Respondent had purchased approximately 44,080 pounds of nickel in 1989. Respondent had no records establishing beginning or year-end nickel inventories for 1989. The inspector was told by Respondent's process supervisor that Respondent used "about 500 pounds per week" of nickel in its manufacturing processes [approximately 26,000 pounds per year]. Based on the information obtained during the inspection, the Region determined that Respondent had processed in excess 25,000 pounds of nickel in 1989 for which it had not filed a TRI report.

The Region filed a complaint against Respondent on January 3, 1992, in which it charged Respondent with failing to file a TRI report for nickel for 1989, in violation of EPCRA § 313(a), 42 U.S.C. § 11023(a), and the implementing regulations 40 C.F.R. Part 372. In the same complaint, the Region also charged Respondent with three other violations of EPCRA § 313, based on its alleged failure to file TRI reports for sulfuric acid for 1989, 1990, and 1991. The Region proposed a penalty of $17,000 for each of the four violations.

In response to the complaint, Respondent sent a letter (the "nickel usage report") to the Region on March 13, 1992, stating that "[c]alculations of our actual nickel usage for 1989 demonstrate that [Respondent] did not process nickel in excess of 25,000 pounds" in 1989, [5] and asking the Region to withdraw Count I of the complaint (relating to the TRI reporting violation for nickel). The letter explained that:

> The best determination of our usage is provided by the calculation of weight from plating thickness on the parts and the

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[5] Letter from Respondent to Becky Ingrum Dolph, Region VII, March 13, 1992.

> number of parts produced during the year. This determination calculates a usage of 23,998 pounds for 1989.

Letter at 1 (R Ex 1). [6]

After settlement negotiations failed and the Region refused to drop the nickel count from the complaint, the case proceeded to hearing. On June 18, 1992, the parties entered into a pre-hearing stipulation in which Respondent admitted to all of the elements of the violations alleged with respect to sulfuric acid in Counts II, III and IV. With regard to nickel, Respondent admitted that its facility is subject to the reporting requirements of EPCRA § 313; that nickel is a listed toxic chemical under 40 C.F.R. § 372.65; that Respondent "processes" nickel, as defined at 40 C.F.R. § 372.3; and that Respondent did not file a TRI report for nickel for 1989. By virtue of these admissions, the only issue identified for a hearing as to liability was whether Respondent had, in fact, processed more than 25,000 pounds of nickel in 1989.

The Presiding Officer issued a partial accelerated decision on November 20, 1992, in which she held that Respondent had violated EPCRA, by failing to file TRI reports for sulfuric acid, as alleged in Counts II, III and IV. Thereafter, on May 6, 1993, the Presiding Officer held a hearing to determine whether Respondent had exceeded the reporting threshold for nickel, as alleged in Count I, and to determine an appropriate penalty for the violations alleged in Counts II, III, and IV (and Count I, if liability were established).

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[6] Respondent calculated what it described as the "actual" amount of nickel on its products using the following methodology:

(1) It measured the thickness of the nickel coating on 15 samples of [nickel-coated parts from its two can opener models (the 407 Can Opener and the 107 Can Opener);

(2) Based on these measurements, it calculated the "Average Thickness (in inches)" of nickel on each can opener (A chart titled Thickness Determination lists can opener parts by part number in one column and the "Average Thickness (in inches)" of the listed parts in a second column);

(3) Using a mathematical formula, it calculated the *average weight* of the nickel on each can opener;

(4) It multiplied the average weight of nickel on each model of can opener by the total number of can openers of the model that it manufactured in 1989 and determined that the total nickel plated onto the can openers in 1989 was 22,678 pounds;

(5) Based on its assumption that can openers represented 94.5% of its production in 1989, it calculated that it had plated 23,998 pounds of nickel onto all of its products in 1989.

At the hearing, Regional counsel stated that the Region would prove that Respondent had processed more than 25,000 pounds of nickel in 1989 by demonstrating that the total quantity of nickel that Respondent had plated onto its products plus the total amount of waste nickel that resulted from the plating process exceeded 25,000 pounds. The Region relied on Respondent's March 13, 1992 letter to show that Respondent had plated 23,998 pounds of nickel onto its products in 1989. The Region also introduced evidence to show that the nickel waste solutions that remained after the plating process contained an additional 5,526 pounds of nickel. The Region argued that this evidence, together with other evidence, including statements made by Respondent's process supervisor at the inspection to the effect that the company used 500 pounds of nickel a week and invoices to show Respondent had purchased in excess of 40,000 pounds of nickel in 1989, were sufficient to show that Respondent had exceeded the 25,000 pound threshold for a TRI report.

To rebut this evidence, Respondent presented the testimony of Respondent's process supervisor, Mr. Vogelpohl. Mr. Vogelpohl focused his testimony on Respondent's March 13, 1992 letter. He explained that it had been intended to reflect "the maximum" nickel that the company had plated onto its products in 1989 and had not been intended as an estimate of Respondent's actual nickel usage. Mr. Vogelpohl stated that Respondent had tried to find:

> [W]here on these parts would have the largest amount of nickel deposit, calculate them all through and determine that we couldn't have gone over this amount based on our parts.

Tr. 84. He acknowledged, however, that the nickel usage data in the letter:

> [C]annot really determine * * * what the actual hundred-percent-sure amount was * * *. It is possible that it was over the 25,000 pounds * * * [but] we didn't feel that we could have put that amount of plating on over 25,000 pounds.

Id. Mr. Vogelpohl further testified that Respondent had purchased 44,080 pounds of nickel in 1989 because the price of nickel was low, not because the company required that much nickel for its manufacturing operations. He did not dispute, in any way, the Region's contention that Respondent had also processed 5,526 pounds of waste nickel.

The Presiding Officer issued an Initial Decision on December 27, 1993, in which she held that the Respondent had processed nickel in excess of EPCRA

§ 313's 25,000 pound threshold and, therefore, had been required to file a TRI report. In particular, she found that Respondent had plated 23,998 pounds of nickel onto its products, relying primarily on Respondent's March 13, 1992 letter. Initial Decision at 4. She then added to that amount the 5,526 pounds of nickel waste which remained in the rack stripping and bath solutions. Since the total of these two amounts exceeds 25,000 pounds, she held that Respondent had violated EPCRA as alleged. She reduced the proposed penalty from $17,000 to $12,000 for each of the four violations alleged in the complaint, based on Respondent's "unusual" degree of cooperation with the Agency. *Id*. at 6-7. [7] This appeal followed.

On appeal, Respondent raises one issue. It contends that the Presiding Officer erred when she used 23,998 pounds as "the *true amount* of nickel poundage plated onto [its] product * * *" in 1989 (emphasis added). Respondent's Appeal at 3. Respondent argues that the 23,998 pound figure in its nickel usage study represents a "theoretical maximum" nickel thickness on the plated parts not the actual average thickness of the nickel on those parts. It maintains that the actual amount of nickel it processed cannot be determined. Since Respondent concedes that it may have processed more than 25,000 pounds of nickel, [8] we construe its argument to be that without proof of the precise amount of nickel plated onto the Respondent's product the Region could not have met its burden of proof.

The Region responds that it satisfied its burden of proof. It argues that it provided ample evidence to establish a prima facie case that Respondent processed at least 25,000 pounds of nickel in 1989, and that Respondent did not rebut the Region's evidence. The Region has also moved to dismiss Respondent's appeal on the ground that Respondent has not complied with the Agency's procedural rules for filing an appeal.

II. *DECISION*

A. *Motion to Dismiss*

We are denying the Region's motion to dismiss. The Region argues that we should dismiss the appeal because Respondent failed to comply with certain procedural requirements of 40 C.F.R. § 22.30(a). Specifically, Respondent filed its appeal with the EPA Hearing Clerk rather than with the Board and did not file

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[7] The Region has not appealed from this penalty reduction.

[8] *See* Tr. 54 and discussion *infra*.

Proposed Findings of Fact and Conclusions of Law, and a Proposed Order. Although these are errors under our rules none of these errors were prejudicial to the Region. Accordingly, we are exercising our discretion to overlook them and we will consider the appeal, as if properly filed. *See In re Nello Santacroce & Dominic Panelli d/b/a Gilroy Associates*, TSCA Appeal No. 92-6, at 8 n.16 (EAB, March 25, 1993). Therefore, the Region's motion is denied.

B. *Burden of Proof*

For the reasons set forth below, we find that the Region has sustained its burden of proof of the violation and we therefore affirm the Initial Decision. We begin by reviewing the applicable provision of the Consolidated Rules of Practice which provides:

> The complainant has the burden of going forward with and of proving that the violation occurred as set forth in the complaint and that the proposed civil penalty, revocation, or suspension, as the case may be is appropriate. Following the establishment of a prima facie case, respondent shall have the burden of presenting and of going forward with any defense to the allegations set forth in the complaint. Each matter of controversy shall be determined by the Presiding Officer upon a preponderance of the evidence.

40 C.F.R. § 22.24.

In addition, we note that the "preponderance of the evidence" standard, as provided for in 40 C.F.R. § 22.24, has been interpreted to mean that a reasonable person would find "a contested fact more probably true than untrue." *Sanders v. U.S. Postal Service*, 801 F.2d 1238, 1330 (Fed. Cir. 1986). *See*, *In re Great Lakes Division of National Steel Corp.*, EPCRA Appeal No. 93-3, at 10 (EAB, June 29, 1994).

If we examine the current record against the "preponderance of the evidence" standard it is clear that the Region provided more than ample evidence to sustain its burden of proof and thus a finding of violation.

First, the Region produced invoices indicating that Respondent had purchased 44,080 pounds of nickel in 1989, almost twice the threshold quantity on which the reporting requirement is based. This evidence showed that Respondent was certainly capable of processing an amount of nickel in excess of the reporting

requirement. Indeed, without any records showing how much of a reportable substance remains at a year's end, we believe that invoices alone may be sufficient to establish a prima facie case, particularly where, as here, there was evidence of several annual purchases over the reporting threshold. [9] We agree with the Region that allowing companies to avoid reporting requirements simply by not maintaining inventory records would frustrate the statutory purpose of maintaining a comprehensive inventory of toxic chemicals.

Second, the Region introduced statements made by Respondent at the inspection that it used approximately 500 pounds of nickel a week or 26,000 pounds a year. The evidence was then bolstered by Respondent's own written report which plainly states that "23,998 pounds is the "best determination of our [nickel] usage [on products in 1989] * * *." Finally, the Region produced undisputed evidence to show that Respondent had processed an additional 5,526 pounds of nickel that remained in the waste solutions.

The Region clearly established a prima facie case and having done so, the burden shifted to the Respondent to rebut the Region's prima facie case. 40 C.F.R. § 22.24. We agree with the Presiding Officer that Respondent was unsuccessful in that endeavor. Respondent's sole contention is that Respondent's nickel usage report may not be accurate and, therefore, should not have been relied upon to show a violation. Respondent's contention that the 23,998 pound figure in its nickel usage report was based on measurements of the *maximum* nickel on the product parts and therefore the actual amount of nickel used on its products may be less does not amount to a rebuttal of the Region's case for several reasons. First, the contention is contradicted by the specific language in Respondent's own written report. The report includes a chart titled "*Actual* Nickel Usage 1989," which states that the "TOTAL NICKEL USED FOR ALL PRODUCTION" was 23,998 pounds. The report states that the 23,998 pound figure is based on the *average* thickness of the plated parts on Respondent's products. Respondent's witness offered no explanation why Respondent used the words "actual nickel usage" if it meant "theoretical maximum usage" or why it used the words "*average* thickness" if it meant "maximum thickness."

Second, and of equal importance, Respondent failed to submit any evidence to suggest that its nickel plating activities and the nickel waste solution remaining amounted to *less* than 25,000 pounds. In light of Respondent's concession that it "processed" 5,526 pounds of waste nickel in 1989, in order to

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[9] *See infra* n.10.

avoid the EPCRA reporting obligation Respondent would have had to demonstrate that it plated less than 19,500 pounds of nickel onto its products (since 19,500 pounds plus 5,526 pounds would exceed 25,000 pounds). The record simply provides no basis for that conclusion. To the contrary, Respondent admits that "it's possible" that the amount of plating on its products "came out 23,000, 22,000, in which [case] the amount [EPA] came up with, the 5,000 pounds, would have been over 25,000 * * *." Respondent concedes that "[w]e don't feel that we used that amount [but we] have no proof * * *." Tr. 54. [10]

Having failed to produce any evidence to show that it processed less than 25,000 pounds of nickel in 1989, the Presiding Officer properly determined that the Region had met its burden of proof by a "preponderance of the evidence." Respondent has not pointed any evidence in the record to show that the Presiding Officer's conclusion was erroneous.

III. *CONCLUSION*

For the reasons stated above, we hereby affirm the Initial Decision assessing a total civil penalty of $48,800 against Respondent, consisting of a civil penalty of $12,000 for each of the four violations alleged in the complaint. Payment shall be made within sixty (60) days after receipt of this Order, unless otherwise agreed by the parties, by sending a certified or cashier's check, payable to the Treasurer, United States of America, to:

U.S. EPA - Region VII
Regional Hearing Clerk
P.O. Box 360748M
Pittsburgh, PA 15251

So ordered.

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[10] The remaining evidence in the case also supports the Region's contention that Respondent used at least 25,000 pounds of nickel in 1989. Respondent stipulated that it purchased 44,080 pounds of nickel in 1989, another 44,080 pounds of nickel in 1990 and still another 44,080 pounds of nickel in 1991, and that only 21,776 pounds remained as of mid-June, 1992. Assuming it had *no nickel inventory* as of January 1989, it processed 110,464 pounds of nickel between January 1989 and mid-June 1992. If, as Respondent claims, it processed less than 25,000 pounds of the nickel in 1989, then it must have processed the remaining 85,464 pounds between January 1990 and mid-June 1992 (an average of 34,000 pounds per year). Respondent's actual production figures, which indicate a 5-10% annual increase in can opener production between 1989 and 1992, are inconsistent with a 35% increase in the use of nickel.